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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

GILBERTO GOMEZ SANCHEZ,

Defendant and Appellant.

F036126

(Super. Ct. No. CRF99-41806)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Patrick J. O'Hara, Judge.

Richard A. Levy, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Robert R. Anderson, Assistant Attorney General, Lloyd G. Carter and Michelle L. West, Deputy Attorneys General, for Plaintiff and Respondent.

On November 22, 1998, defendant Gilberto Gomez Sanchez caused a traffic accident that killed four people. With respect to this occurrence, on March 6, 2000, he

was convicted by court trial on four counts of second degree murder, two counts of causing injury while driving under the influence (DUI) and driving with a blood-alcohol content over 0.08 percent (being a person with a prior conviction), and enhancements for infliction of great bodily injury. (Pen. Code, § 187; Veh. Code, § 23153, subds. (a)-(b); & former § 23190, subd. (a); Pen. Code, § 12022.7, subd. (a).) He was also convicted of one misdemeanor count. On appeal, he alleges there was insufficient evidence to support his second degree murder convictions. He also alleges the trial court erred by sentencing him on four counts of gross vehicular manslaughter, which the court had previously stricken as lesser included offenses.

We affirm the second degree murder convictions and direct the trial court clerk to prepare an amended abstract of judgment to correct the mistaken listing of convictions for gross vehicular manslaughter.

FACTS

I. Prior DUI Arrests

October 9, 1993

While Lindsay police officer Richard Tristao was driving northbound, defendant was driving southbound. Defendant operated his vehicle in the middle of the road and Tristao had to swerve to avoid a collision. Tristao made a traffic stop and spoke with defendant. The officer noticed a very strong odor of alcoholic beverage coming from defendant's person. Defendant had an unstable gait and had difficulty maintaining his balance. He failed the field sobriety tests the officer administered. His eyes were bloodshot and watery. Two passengers in the car had passed out and smelled strongly of alcohol. Defendant was arrested and taken to the police station where a breath test showed a .25 percent blood-alcohol level.

February 26, 1994

The same officer again arrested defendant. Officer Tristao was investigating a hit-and-run accident involving a Chrysler Cordoba that, according to witnesses, had struck a fence, knocked down several galvanized-metal poles, and fled. The vehicle had left brown paint marks on the poles. Tristao located the vehicle. It had front-end damage and matched the color and make of the suspect vehicle. Defendant had a strong odor of alcoholic beverage coming from his person, bloodshot, watery eyes, and an unstable gait. He failed the field sobriety tests. Breath tests indicated a .27 and .25 percent blood-alcohol level.

April 11, 1994

Shortly after midnight, a California Highway Patrol officer arrested defendant for DUI. Defendant and another man were pushing a late 1970's, brown Chrysler Cordoba with Washington plates along the road. Defendant hopped into the car and steered it toward the curb. When the officer stopped to render assistance, he noticed defendant had the odor of alcoholic beverage on his breath. Defendant failed four field sobriety tests.

April 15, 1994

A Lindsay police officer saw a brown Chrysler Cordoba with Washington plates driving slowly, without its headlights on, in the darkness. The officer stopped the vehicle and noted the driver, defendant, had red, bloodshot, watery eyes and slow, slurred speech. Defendant smelled of alcohol and had an unsteady gait. He failed three field sobriety tests -- the one-leg lift, the one foot in front of the other test, and the modified position of attention. In each case, defendant was unable to maintain his balance. Two breath test readings indicated defendant had a .24 percent blood-alcohol level.

April 1, 1995

A California Highway Patrol officer observed defendant passing another vehicle on the highway. Defendant swerved in and out of the lane and fishtailed, almost losing control. The officer stopped the vehicle and spoke with defendant. Defendant displayed red eyes and slurred speech. At first, he gave the officer a false name and an incorrect birthdate. Then he gave his correct birthdate and the officer learned from a dispatcher that there were outstanding warrants for a "Gilberto Sanchez Gomez." The officer noticed a strong odor of alcoholic beverage on defendant's breath. The officer administered field sobriety tests and defendant performed poorly. At the police station, the officer administered a breath test which indicated defendant had a .23 percent blood-alcohol level.

Defendant was convicted and received probation for both the April 11, 1994, offense and for the April 1, 1995 offense.

II. Events Preceding the Accident

On November 21, 1998, defendant drove his gray Cadillac to a wedding and reception in Fresno. He had six passengers with him -- his sister Victoria and her son, his brother Gaspar, Gaspar's wife Casilda, and their two children. During the reception, Cristobal Moreno Espinoza saw defendant drinking beer. Cristobal's brother, Fausteno Moreno Espinoza, drank with defendant at the party. He saw defendant drink beer and then liquor. They drank almost the entire time they were at the reception.

Later, defendant drove Cristobal, Fausteno, and Gaspar to Goshen in his car. Cristobal was "a little bit frightened" to get in the car with defendant because he seemed "a little bit drunk," given his speech and the appearance of his eyes. On the way to Goshen, they stopped at a gas station to buy beer. Defendant drank beer during the drive to Goshen. At about 1 a.m., they arrived at the home of defendant's niece,

Rosa Vargas, where they sat at a table drinking and talking until about 5 a.m.

Defendant drank beer.

They awoke the next morning at about 10 a.m. Cristobal watched soccer on the television while the women barbecued meat. Defendant sat outside talking. At one point, Cristobal saw defendant with a beer. Later that day, defendant drove his car to Plainview. He had eight passengers -- Cristobal, Fausteno, defendant's brother Gaspar, Gaspar's wife Casilda and their two children, and defendant's sister Victoria and her son. Defendant dropped Cristobal and Fausteno off at their sister's home in Plainview.

III. The Accident

At about 4 p.m. on November 22, 1998, defendant failed to yield at a stop sign and drove into the path of an oncoming car. California Highway Patrol investigators opined defendant's failure to yield caused the accident. A white Plymouth traveling along Highway 65 at 80 miles an hour collided with defendant's car. Defendant did not check for oncoming traffic before entering the intersection, although visibility was about one mile. Four of defendant's passengers were killed -- his sister-in-law Casilda and her daughter, and his sister Victoria and her son. A passenger in the Plymouth suffered great bodily injury.

Immediately after the accident, defendant put his foot on the accelerator. When the engine "revved" and the car lurched forward, one witness thought he was trying to drive away. A bystander went up and turned off the vehicle's ignition. Two and a half hours later, defendant's blood-alcohol level was .15 percent. A forensic toxicologist testified the burn-off rate for ethyl alcohol from the human body is .02 percent per hour. The toxicologist estimated defendant's blood-alcohol content at the time of the

accident was .19 percent. At the hospital that evening, defendant gave officers a false name. The next day, at a jailhouse interview after waiving his *Miranda* rights,¹ defendant again lied about his name, but admitted he was the driver and said he had had two or three beers “that day.” Defendant admitted “a judge told him that he was to stop drinking and driving.”

DISCUSSION

I. Sufficiency of Evidence

Defendant argues the trial court’s findings of implied-malice murder cannot stand because there was insufficient evidence to show he understood his heavy drinking would impair his driving ability. Our role on appeal is a limited one. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) “The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]” (*Ibid.*)

“Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness’s credibility for that of the fact finder.” (*People v. Ochoa, supra*, 6 Cal.4th at p. 1206.)

¹ *Miranda v. Arizona* (1966) 384 U.S. 436.

Malice may be implied “when a person, knowing that his conduct endangers the life of another, nonetheless acts deliberately with a conscious disregard for life.” (*People v. Watson* (1981) 30 Cal.3d 290, 296.) An intoxicated driver who causes death may be found guilty of second degree murder on a theory of implied malice if “the defendant *actually appreciated* the risk involved, i.e., a *subjective* standard.” (*Id.* at pp. 296-297.) Prior drunk driving convictions are admissible to prove a defendant’s subjective awareness of the risks of drunk driving. (*People v. Johnson* (1994) 30 Cal.App.4th 286, 292.) Numerous cases have upheld drunk driving murder convictions. (*People v. Autry* (1995) 37 Cal.App.4th 351, 358.) “[T]hese cases have relied on some or all of the following factors in upholding such convictions: (1) blood-alcohol level above the .08 percent legal limit; (2) a predrinking intent to drive; (3) knowledge of the hazards of driving while intoxicated; and (4) highly dangerous driving.” (*Ibid.*)

Defendant concedes that the first factor was satisfied. His blood-alcohol level was .19 percent at the time of the accident. But defendant contests factors (2), (3) and (4). As to factor (2) he argues he did not intend to drive after drinking a substantial amount of alcohol, but rather, tried to sleep off the effects of his drinking from the previous night. As to factor (3), he concedes he was aware of the risk of drinking and immediately getting behind the wheel. But he argues he was not aware of the longer-term risks -- that his metabolism was too slow to burn off the effects of heavy drinking which commenced the day before the accident. As to factor (4), he argues there was no evidence of dangerous driving immediately prior to the lapse that led to the collision.

We find there was sufficient evidence to satisfy factor (2)--the predrinking intent to drive--because on the occasion of his five prior arrests, on the day before the accident, and on the day of the accident, defendant consistently drank before driving.

And, in many instances, he drank an amount of alcohol sufficient to elevate his blood-alcohol level beyond legal limits. Contrary to defendant's argument that he did not intend to drive after drinking substantial amounts of alcohol but that he had tried to sleep off the effects of the previous night's drinking, the evidence suggests there may have been, at most, only a six-hour gap between the last time defendant consumed two or three beers at the Vargas's home and the time of the accident at 4 p.m.

We also find there was sufficient evidence to satisfy factor (3)--that defendant was actually aware of the risks of drunk driving. Defendant's long history of drunk driving arrests and convictions made him aware of both the short-term and long-term risks of driving after drinking large amounts of alcohol. Further, after the accident here, defendant admitted to an officer that "a judge had told him that he was to stop drinking and driving."

Respondent concedes there was no evidence to support factor (4). We agree. But not all of the factors need to be present to sustain a conviction of vehicular second degree murder. (*People v. Olivas* (1985) 172 Cal.App.3d 984, 989.) Here, the first three factors set forth in *People v. Autry, supra*, 37 Cal.App.4th 351 were strongly supported by the evidence. Accordingly, we find sufficient evidence supported the trial court's verdict.

II. Sentencing Error

Defendant contends, and respondent concedes, the trial court erred in sentencing defendant. The trial court convicted defendant on counts 1 through 4 (second degree murder), but dismissed counts 5 through 8 (gross vehicular manslaughter while intoxicated) as lesser included offenses. At sentencing, the court imposed sentences on counts 5 through 8 and stayed them.

Although sentencing errors are generally waived by a failure to timely object before a trial court, a "narrow exception" exists for errors that produce an unauthorized

sentence. (*People v. Scott* (1994) 9 Cal.4th 331, 354.) A sentence is unauthorized if “it could not lawfully be imposed under any circumstances in the particular case.” (*Ibid.*) A claim that a sentence is unauthorized may be raised for the first time on appeal and is subject to judicial correction whenever the error comes to the attention of the reviewing court. (*People v. Dotson* (1997) 16 Cal.4th 547, 554, fn. 6.)

DISPOSITION

We direct the clerk of the superior court to amend the abstract of judgment and any other relevant documents to reflect that: (1) defendant was convicted by the court, not by a jury; and (2) counts 5, 6, 7, and 8 (Pen. Code, § 191.5, gross vehicular manslaughter while intoxicated) and any sentences thereon are stricken. In all other respects, the judgment is affirmed.

VARTABEDIAN, Acting P. J.

WE CONCUR:

WISEMAN, J.

LEVY, J.